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No. 85-1349

Supreme Court, U.S.
FILED
MAY 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1985

INTAKE WATER COMPANY, PETITIONER

v.

YELLOWSTONE RIVER COMPACT COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 *et seq.*, which ratified the Yellowstone River Compact between the States of Montana, North Dakota, and Wyoming, provides the necessary congressional consent to shield a provision of the Compact from attack under the Commerce Clause.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-6a) is reported at 769 F.2d 568. The opinion of the three-judge district court (Pet. App. 7a-18a) is reported at 590 F. Supp. 293.

JURISDICTION

The judgment of the three-judge district court was entered on October 25, 1983. The judgment of the court of appeals was entered on August 20, 1985; a petition for rehearing was denied on November 15, 1985. The petition for a writ of certiorari was filed on February 11, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1]After the district court entered its judgment, petitioner was uncertain whether to appeal to the court of appeals or to appeal directly to this Court under 28 U.S.C. 1253; petitioner therefore filed a protective

STATEMENT

1. On October 30, 1951, Congress granted its consent to a compact entered into by the States of Montana, North Dakota, and Wyoming relating to the use of waters from the Yellowstone River (ch. 629, 65 Stat. 663 *et seq.*). See Pet. App. 22a-38a. Article X of the Yellowstone River Compact (the Compact) provides in pertinent part that "[n]o water shall be diverted from the Yellowstone River Basin without the unanimous consent of all the signatory States." 65 Stat. 669; Pet. App. 34a.

In 1973, petitioner devised a plan to divert appropriated waters from the Yellowstone River to points outside the Yellowstone River Basin (Pet. App. 3a). Unable to secure the consent of Montana, one of the three Compact states, to its proposed diversion (see *id.* at 9a n.2), petitioner filed the present action in the United States District Court for the District of Montana.[2] Among other things, petitioner contended that Article X of the Compact constitutes an unconstitutional burden on interstate commerce because it requires the consent of three states before an interbasin water transfer is allowed (see Pet. App. 10a-11a).

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jurisdictional statement in this Court on July 24, 1984. On October 29, 1984, this Court dismissed the appeal for lack of jurisdiction (No. 84-131). See Pet. App. 21a.

[2]Petitioner named as defendants the Yellowstone River Compact Commission, the individual members of the Commission, the Attorney General of the State of Montana, the State Engineer of the State of North Dakota, and the North Dakota State Water Commission. Article III of the Compact provides that one representative on the Commission shall be selected by the Director of the United States Geological Survey and shall act as Chairman of the Commission without voting privileges except in specified instances. 65 Stat. 665.

2. Petitioner's claim was rejected by a three-judge district court (Pet. App. 7a-18a).[3] The court explained (Pet. App. 12a):

> [D]efendants [respondents in this Court] rely on the following argument: The Yellowstone River Compact, as a compact between states, was approved by the United States Congress; because the Compact was approved by Congress, the Compact is federal, not state law for consideration of Commerce Clause objections; therefore, the Compact cannot, by definition, be a state law impermissibly interfering with interstate commerce, but must be a federal law immune to Commerce Clause objections. We find this argument compelling. When Congress approved the Compact, Congress was acting within its authority to immunize state law from Commerce Clause objections by converting it to federal law.

The court added that there was no doubt in this case that Congress meant to endorse the challenged restrictions on interstate commerce, because "the Compact was before Congress and Congress voted to approve it" (Pet. App. 13a). The court therefore found distinguishable cases in which Congress had failed to expressly immunize state legislation from the reach of the Commerce Clause (*id.* at 13a-14a).[4]

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[3]At the time this case was filed, a three-judge district court was required to hear any suit in which an injunction restraining the enforcement of a state statute was sought on federal constitutional grounds. 28 U.S.C. (1970 ed.) 2281. This requirement was repealed prospectively in 1976. See Pub. L. No. 94-381, 90 Stat. 1119 *et seq.*

[4]The district court also rejected petitioner's claims that the Compact denied it equal protection (Pet. App. 14a-16a) and that petitioner's proposed diversion was outside the regulatory purview of the Compact (*id.* at 16a-18a). Those rulings are not at issue here.

The court of appeals affirmed (Pet. App. 1a-6a), accepting the reasoning of the district court (*id.* at 4a). The court of appeals agreed that there could be no "question as to whether Congress in fact approved the state law [for] which immunity from Commerce Clause attack is claimed: The Compact was before Congress and Congress expressly approved it" (*ibid.*). And the court found additional support (*id.* at 4a-5a) for its decision in *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, No. 84-363 (June 10, 1985), which, it noted, held that " '[w]hen Congress so chooses, state actions which it plainly authorizes are invulnerable to constitutional attack under the Commerce Clause.' " Pet. App. 5a (quoting *Northeast Bancorp*, slip op. 14).[5]

ARGUMENT

1. It is common ground that Congress, acting pursuant to the Commerce Clause's affirmative grant of authority, "[may] redefine the distribution of power over interstate commerce" by permitting the states "to regulate the commerce in a manner which would otherwise not be permissible." *Southern Pacific Co.* v. *Arizona*, 325 U.S. 761, 769 (1945). Thus, if Congress "ordains that the States may freely regulate an aspect of interstate commerce, any action taken by a State within the scope of the congressional authorization is rendered invulnerable to Commerce Clause challenge." *Western & Southern Life Ins. Co.* v. *State Board of Equalization*, 451 U.S. 648, 651-652 (1981). It is equally

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[5]Judge Tashima concurred, specifically rejecting petitioner's assertion that it should be inferred from the "essentially silent congressional record" (Pet. App. 6a) that Congress, in approving the Compact, did not intend to shield it from Commerce Clause objections. By rejecting petitioner's argument, Judge Tashima explained, the court "merely ascribe[d] to Congress the intent plainly to be inferred from its action, *i.e.*, that it intended to do what it did—approve the Yellowstone River Compact without reservation" (*ibid.* (footnote omitted)).

clear, however, that congressional authorization of otherwise invalid state legislation must be expressly stated. See generally *Northeast Bancorp, Inc.* v. *Board of Governors of the Federal Reserve System*, No. 84-363 (June 10, 1985), slip op. 13-14; *South-Central Timber Development, Inc.* v. *Wunnicke*, No. 82-1608 (May 22, 1984), slip op. 5-10; *White* v. *Massachusetts Council of Construction Employers, Inc.*, 460 U.S. 204, 215 (1983); *Sporhase* v. *Nebraska ex rel. Douglas*, 458 U.S. 941, 960 (1982); *Western & Southern*, 451 U.S. at 654.

The "dispositive question" in this case, then, "is whether Congress in fact has authorized the states to impose [the] restrictions * * * at issue * * *." *New England Power Co.* v. *New Hampshire*, 455 U.S. 331, 340 (1982). And that question is unequivocally answered by the Act of Oct. 30, 1951, ch. 629, 65 Stat. 663 *et seq.*, which states in Section 1 that "the consent of the Congress is hereby given to [the Yellowstone River Compact]" (65 Stat. 663). Section 1 of the Act also sets out the provisions of the Compact, while Section 2 expressly reserves the right of Congress "to alter, amend or repeal [S]ection 1 * * *." 65 Stat. 671. It is thus plain on the face of the law that Congress "affirmatively contemplate[d]" the restrictions on water use authorized by the Yellowstone River Compact; by approving Article X of the Compact, Congress made "unmistakably clear" its intent to authorize the signatory states to foreclose the diversion of water from the Yellowstone River Basin. *South-Central Timber Development, Inc.* v. *Wunnicke*, slip op. 9.

In applying the law as written, the court of appeals accordingly did not, as petitioner repeatedly asserts (Pet. 7, 11, 17-18), depart from the principle that Congress must act expressly when it authorizes the states to impede the flow of commerce. Instead, the court simply held that Congress *had* expressly authorized state involvement in the regulation of

interstate commerce by giving its consent to Article X of the Compact, which provides that "[n]o water shall be diverted * * * without the unanimous consent of all the signatory States" (65 Stat. 669). Indeed, given the explicit language of the Compact, the court could hardly have held otherwise. Similarly, petitioner's suggestion that the court of appeals improperly awarded the signatory states "all powers over interstate commerce that can possibly be read into the Compact" (Pet. 18) entirely ignores the language of Article X: the state of Montana, in withholding its consent to the diversion of water, did nothing more than it explicitly was permitted to do by Congress.

2. Petitioner does not deny that Congress has given its consent to Article X of the Yellowstone River Compact; for that matter, petitioner evidently acknowledges (Pet. 3, 13-14) that Congress enacted the Compact into federal law. Petitioner nevertheless insists (Pet. 13-17) that the Compact is not a federal law "for all purposes" (Pet. 14 (footnote omitted)).[6] But it entirely fails to explain why this should be so. While petitioner notes (Pet. 15-17) that Congress may approve a Compact by means other than an act of consent, that observation is irrelevant here[7]: consent to the Yellowstone River Compact—and the Compact itself—was passed by both Houses of Congress, signed into law by the President (see 97 Cong. Rec. 13733 (1951)), and printed in the United States Statutes at Large (65 Stat. 663 *et seq.*). For

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[6]Even if the Compact somehow were deemed not to be a federal law, petitioner offers no reason to believe that Congress's explicit consent to the Compact—which concededly was given—is insufficient to shield state actions taken pursuant to the Compact from Commerce Clause attack.

[7]In fact, even where congressional consent is conferred by means other than legislation specifically approving a given compact, that consent converts the compact into federal law. See *Cuyler* v. *Adams*, 449 U.S. 433, 441-442 (1981).

the same reason, petitioner's comments about compacts that were "never subjected to the normal congressional legislative process" (Pet. 17) simply have no application here.[8] And petitioner's suggestion that a compact approved by Congress should be deemed to be a federal law only for purposes of providing federal court jurisdiction (Pet. 13) cannot be reconciled with the decisions of this Court. See *Texas* v. *New Mexico*, 462 U.S. 554, 564 (1983); *Cuyler* v. *Adams*, 449 U.S. 433, 438-439 n.7 (1981); *Washington Metropolitan Area Transit Authority* v. *One Parcel of Land*, 706 F.2d 1312, 1318-1319 (4th Cir.), cert. denied, 464 U.S. 893 (1983).[9]

3. Petitioner's narrower argument that Congress did not in fact intend to shield Article X of the Compact from Commerce Clause objections (Pet. 10-13) similarly founders on the statutory language. In providing that no water may be removed from the Yellowstone River Basin without the consent of the signatory states, Congress obviously

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[8]Petitioner's sole evidence for the proposition that the Compact is not an ordinary federal law is the fact that Congress expressly reserved the right to alter, amend, or repeal the Act of Oct. 30, 1951 (Pet. 17). But Congress often explicitly reserves its right to repeal legislation to make clear its intention not to create vested rights. See, *e.g.*, 42 U.S.C. 1304.

[9]In making this suggestion, petitioner cites (Pet. 13) *Cuyler*, where the Court held that the Interstate Agreement on Detainers is "an interstate compact approved by Congress and is thus a federal law subject to federal rather than state construction" (449 U.S. at 438). The Court reasoned in *Cuyler* that, "[b]ecause congressional consent transforms an interstate compact within [the Compact Clause] into a law of the United States, * * * the construction of an interstate agreement sanctioned by Congress under the Compact Clause presents a federal question" (*ibid.*). This reasoning plainly provides petitioner with no support: the Court held that interpretation of a compact presents a federal question because congressional consent converts the compact into federal law.

contemplated that those states might withhold their consent.[10]

There is no doubt, moreover, that Congress knew what it was doing when it approved the Compact. In 1949, Congress authorized the signatory states to enter into a compact regarding the division and apportionment of the waters of the Yellowstone River,[11] with the proviso that none of the parties would be bound by the compact unless and until it was approved by each state legislature and by Congress. Act of June 2, 1949, ch. 166, 63 Stat. 152-153. Congress further provided that a representative of the United States "shall participate in said negotiations * * * and shall make a report to Congress of proceedings and of any compact or agreement entered into * * *." *Ibid.* Congress was thus aware that its consent was necessary to give the negotiated compact the force of law. By granting its consent, Congress necessarily recognized that it was authorizing the states, through their representatives on the Compact Commission,

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[10]The Yellowstone River Compact differs in this respect from the Oregon-Washington Columbia River Fish Compact at issue in *Idaho ex rel. Evans* v. *Oregon*, 462 U.S. 1017 (1983), upon which petitioner largely relies (Pet. 9-10). The latter compact simply provides that state laws "regulating, protecting, or preserving fish in the waters of the Columbia River * * * shall be made, changed, altered, and amended in whole or in part, only with the mutual consent and approbation of both States." Act of Apr. 8, 1918, ch. 47, 40 Stat. 515. See *Idaho ex rel. Evans*, 462 U.S. at 1022. Nothing in that compact either directly impedes the flow of interstate commerce or suggests that the signatory states may take action impeding that flow. To the contrary, in approving the compact Congress provided that "[n]othing herein contained shall be construed to affect the right of the United States to regulate commerce." 40 Stat. 515.

[11]Act of June 2, 1949 (63 Stat. 152-153), states that "the consent of Congress is hereby given to the States of Montana, North Dakota, and Wyoming to negotiate and enter into a compact, or agreement, not later than June 1, 1952, providing for an equitable division and apportionment between the States of the water supply of the Yellowstone River * * *."

to enforce the Compact. And, as the district court explained, "when it approves a compact, Congress exercises the legislative power that the compact threatens to encroach upon, and declares that the compact is consistent with Congress's supreme power in that area" (Pet. App. 14a). The restrictions on commerce that are at issue here thus follow from a congressional exercise of the commerce power.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1986

DOJ-1986-05